No. 235

In The Supreme Court Of The United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Appellant*

v.

WILLIAM C. WELDEN

On Appeal from the United States District Court
for the District of Massachusetts

MOTION TO AFFIRM

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CITATIONS

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MOTION TO AFFIRM

Appellee respectfully moves that the Court affirm the judgment of the court below upon the ground that the question presented in the Jurisdictional Statement is so unsubstantial as to make further argument to this Court unnecessary.

OPINION BELOW

The Memorandum and Order of the District Court are not yet reported but are set out as Appendix A to the Jurisdictional Statement.

JURISDICTION

Appellant invokes the jurisdiction of this Court under 18 U.S.C. 3731.

STATUTE INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> • • • no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act]: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

QUESTION PRESENTED

Whether Appellee acquired immunity from this prosecution under 15 U.S.C. 32 by reason of compelled testimony in a Congressional Subcommittee hearing specifically investigating alleged past violations of the antitrust laws.

STATEMENT

Appellee was indicted together with four other individuals and three corporations including Appellee's employer H. P. Hood & Sons, Inc., in a two count indictment charging a conspiracy in violation of Section 1 of the Sherman Act and a conspiracy among some of the defendants to defraud the United States in violation of 18 U.S.C.

371. The court below, upon Appellee's motion, dismissed the indictment as to him upon its findings that Appellee had previously been subpoenaed to appear before a special Subcommittee of the Select Committee on Small Business of the House of Representatives, and there gave testimony under oath which was pertinent "to the very heart and substance of the matters charged in the indictment". It rejected the government's arguments including the contention raised here that the Subcommittee hearings were not conducted under the antitrust laws. Quoting the words of the Subcommittee's Chairman, "The purpose of these hearings is to receive testimony about alleged attempts of large distributors of dairy products in the New England area to destroy small competitors and gain control over prices and markets", the court found that, "The hearings were clearly within the ambit of the immunity statute."

ARGUMENT

I. The Decision Below Was Correct and in Accord with Precedent.

There can be no debate that the investigation in which Appellee gave his testimony was an investigation of subject matter within the scope of the antitrust laws. The court below so found, and its finding, based as it is on a statement of the Subcommittee Chairman at the beginning of the hearing, dispels any doubt whatever.

Appellant's position, as set forth in the Jurisdictional Statement, is that the word "proceedings" as used in the Act of February 25, 1903, 32 Stat. 904 codified as 15 U.S.C. 32, does not include such an investigation because that word is limited to proceedings "authorized" by the antitrust laws. (Jurisdictional Statement, p. 6). Appellant then suggests a further qualification (p. 7) that the pro-

ceedings must be "under the direction of the Attorney General". Both of these propositions were demolished only two years after the Act was passed by the decision of this Court in *Hale* v. *Henkel*, 201 U.S. 43, 66 (1905) that the word "proceeding" as used in this Act was not to receive a narrow or technical construction but was broad enough to include at least an inquiry before a Grand Jury. The antitrust laws, of course, are silent as to Grand Jury investigations, and not only are Grand Jury proceedings not "under the direction of the Attorney General", but they are not a requisite to the commencement of a criminal proceeding under the antitrust laws.

The position taken by the Appellant also ignores the existence of precedent clearly indicating that an investigation of the sort involved in this case brings a witness within the statutory coverage.

Early in 1906 a Federal District Court Judge, with the decision in *Hale* v. *Henkel* before him, held that the statutory immunity extended to witnesses who had appeared before the Commissioner of Corporations, an official of the Department of Commerce, who was conducting an investigation of the "beef trust" pursuant to a resolution of the House of Representatives. *United States* v. *Armour & Co.*, 142 Fed. 808, 826 (D.N.D. Ill. 1906). Two separate immunity provisions were in issue in that case. One was Section 6 of the Commerce and Labor Act of 1903, 32 Stat. 827, which was specifically applicable to the Commissioner of Corporations, and which incorporated by reference the immunity provisions made applicable to the Interstate Commerce Commission by the Compulsory Testimony Act of 1893, 27 Stat. 443. The second was the immunity provision of the Act of February 25, 1903, 32 Stat. 904, which is now 15 U.S.C. 32.

With respect to the former Act, it was urged by the government that it did not apply because the witnesses had

not been compelled by subpoena nor sworn. Judge Humphrey, while rejecting that contention on the ground that the necessary degree of compulsion was present, nevertheless also ruled that an alternative ground of immunity was available:

> "If it shall be said that the act of February 14, 1903, establishing the Department of Commerce and Labor, allows immunity to the witness only upon the conditions urged by the government, viz., that he shall have resisted until regularly subpoenaed and sworn, no such contention can fairly be made as to the immunity clause of the act of February 25, 1903. The record shows, and it is not disputed, that material evidence was procured by Garfield from the defendants upon the subject of an unlawful combination . . . . It is contended that as to all such evidence the defendants are entitled to immunity under the independent and unconditional act of February 25, 1903, and I am of opinion that they are so entitled." 142 Fed. at 826.

The import of Judge Humphrey's ruling is plain. It is that the immunity provided by 15 U.S.C. 32 extends to a proceeding which is an investigation of past antitrust violations by a government official, not under control of the Attorney General, but acting pursuant to the authorization of a resolution of a House of Congress. The parallel to the situation in the case at bar is precise, except that Congress, as is its current practice, elected to have the investigation conducted by a subcommittee of one of its own committees instead of by an official of the Department of Commerce.

The immediate congressional and executive reaction to the decision of Judge Humphrey demonstrates that that decision did not lie hidden under a bushel. What was upsetting, however, was not the holding that the immunity was available in an investigatory proceeding outside of the courts, but that the decision appeared to mean that the immunity might extend to a witness who was in effect a volunteer. A request for corrective legislation was

promptly made by Attorney General Moody and incorporated into President Roosevelt's message to Congress in support of such legislation on April 18, 1906, H.R. Doc. No. 706, 59th Cong. 1st Sess. The result was the enactment of June 30, 1906, 34 Stat. 798 which is now codified as 15 U.S.C. 33. The only change which the Congress saw fit to make, with the result of the *Armour* decision directly before it, was to impose a requirement that henceforth the testimony be given pursuant to a subpoena and under oath.

There can be no doubt of the significance of the *Armour* case or of its relation to the remedial legislation which followed. Speaking for this Court in *United States* v. *Monia*, 317 U.S. 424 (1943) Mr. Justice Roberts summarized the significance and effect of the decision in words which make it clear that he interpreted the decision to have conferred immunity on the witnesses by virtue of 15 U.S.C. 32:

> "In 1906 the District Court for the Northern District of Illinois held, in *United States* v. *Armour & Co.*, 142 F. 808, that a voluntary appearance, and the furnishing of testimony and information without subpoena, operated to confer immunity from prosecution under the Sherman Act. The court held that the immunity conferred was broader than the privilege given by the Fifth Amendment. The decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies. Congress promptly adopted the Act of June 30, 1906, *supra*, providing that the immunity should only extend to a natural person who, in obedience to a subpoena, testified or produced evidence under oath. The Congressional Record shows that the sole purpose of the bill was exactly what its language states. Senator Knox, who sponsored the bill, stated: 'Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself.'

> "It is evident that Congress, by the earlier legislation, had opened the door to a practice whereby the Government might be trapped into conferring unintended immunity by witnesses volunteering to testify. The amendment was thought, as the Congressional Record demonstrates, to be sufficient to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Government official concerned, should compel the witness' attendance by subpoena and have him sworn." 317 U.S. at 428-429.

It will not do to relegate this holding, the only direct precedent in existence, to a footnote, and to minimize its importance by characterizing it as dictum (Jurisdictional Statement, p. 6).

Additional support for avoidance of a narrow construction of 15 U.S.C. 32 is found in *Howitt* v. *United States*, 150 F. 2d 82 (5th Cir. 1945), *aff'd* 328 U.S. 189 (1946). There the court considered the same statute, as it has been codified as 49 U.S.C. 47 in relation to the Interstate Commerce Act, together with the companion provisions of 49 U.S.C. 43 and 46. The court said:

> "These statutes provide that in summary proceedings in the district court, or in hearings before the Interstate Commerce Commission, *or in any other cause or proceeding, where the purpose of the proceeding is to inquire into alleged violations of the Act,* no person shall be prosecuted or subject to any penalty or forfeiture for any matter concerning which he may testify or produce evidence in such proceeding." (150 F. 2d at 84, emphasis supplied)

The "proceeding" in question in that case was a series of interviews by a number of FBI agents, but the ground which the court selected in denying the immunity was the lack of the requisite subpoena and oath.

II. The Legislative History of 15 U.S.C. 32 Is Not in Conflict with the Decision of the Court Below.

The Appellant sets out three bits of "legislative history" which it suggests require a restrictive reading of the statute in question. In fact none of the three suggestions is in any way in conflict with the interpretation placed upon 15 U.S.C. 32 in *Armour* and followed by the court below. The Appellant's contentions will be dealt with seriatim.

1. It is suggested (Jurisdictional Statement, pp. 6-8) that the original appearance of the statute as a rider to a section of an appropriations act which also referred to "proceedings, suits and prosecutions" requires a limited interpretation of those terms as they now appear. The terms of the statute as enacted are as follows:

> "That for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any trans-

> action, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

The suggestion of Appellant is that unless the proviso be thought to be limited to proceedings, suits or prosecutions brought "under the direction of the Attorney General" the phrase "any proceeding, suit or prosecution" would have a meaning different from substantially the same words "proceedings, suits and prosecutions" as used in the first sentence. The problem, however, is not with the words but with their modifiers. In the appropriations portion of the section the words are limited by the phrase "in the courts of the United States" which does not appear in the immunity section. Similarly, in the appropriations provision, the words referred to are part of an adverbial phrase modifying "to be expended under the direction of the Attorney General". There are no such words in the immunity provision. The Appellant's suggestion, therefore, is that where certain words appear as modifiers or with modifiers in one sentence, and appear again in the next sentence without any modifiers except the word "any", the modifying phrase must be read into the second sentence by implication. Appellant reads the immunity proviso as though it said "any *such* proceeding, suit or prosecution", and indeed when Appellant restates its position (Jurisdictional Statement, p. 8), the word "such" not only appears but is italicized. The difficulty is that the word does not appear in the statute.

And indeed if the word "such" did appear, the immunity proviso would then be limited to the proceedings, suits and prosecutions conducted with the $500,000 appropriated by the Act, and when the appropriation was expended, the immunity statute would expire. Obviously Appellant does

not seek this result. Its position is that the immunity proviso is subject to some of the limitations of the appropriation provision but not all of them. This is a little like an optical illusion based on angles. The result may depend on which way one looks at it, but it is impossible to look at it both ways at the same time.

Furthermore, the position relied upon by Appellant was, as noted, rejected by this Court less than two years after the statute was adopted. For in *Hale* v. *Henkel, supra,* this Court ruled that the immunity provision applied to grand jury proceedings, and grand jury proceedings are not brought "under the direction of the Attorney General". *Sullivan* v. *United States,* 348 U.S. 170 (1954).

An argument curiously parallel to that made by Appellant here was raised and disposed of by this Court in *Brown* v. *United States,* 359 U.S. 41 (1959). That case involved the immunity provision of 49 U.S.C. 305(d) which constitutes an incorporation by reference into Chapter 2 of Title 49 of the immunity provision in Chapter 1. That section, like the provision in question, consists of two parts. The statute confers upon the Interstate Commerce Commission "the same power to administer oaths, and require by subpena the attendance and testimony of witnesses . . . relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges and immunities . . . as though such matter arose under chapter 1 of this title . . ." Despite the coincidence of the words "any matter under investigation" in the two clauses, when Appellant contended in *Brown,* as Appellant contends here, that the immunity proviso was by inference limited to the investigations authorized by the first half of the section, and did not extend to a grand jury proceeding, this Court declined to read "such" into the statute, and dismissed the con-

tention as one grasping at straws. The same disposition is appropriate here.

2. It is next suggested (Jurisdictional Statement, pp. 8-9) that the lack of a large number of other provisions authorizing immunity for witnesses before Congressional committees makes the provision considered here somewhat suspect. Only one other provision has been enacted, it is suggested, during the last one hundred years. Whether this be so may depend on the interpretation of a number of other statutes (See e.g. the Compulsory Testimony Act of 1893 discussed below), but the congressional intent in enacting 15 U.S.C. 32 must be considered from the vantage point of 1903, not 1963. In 1857 Congress had provided by 11 Stat. 155 an extremely broad immunity which would have run to any witness before any congressional committee. In 1862 this was cut back, 12 Stat. 333, to a provision prohibiting use of testimony before congressional committees in subsequent prosecutions. It was not, however, until the decision of this court in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) that it became apparent that this provision was not an effective immunity statute. During the next eleven years leading up to the enactment of 15 U.S.C. 32, Congress passed a series of immunity statutes in particular areas, primarily investigations under the commerce and antitrust laws which, as Judge Humphrey's decision in the *Armour* case, *supra*, made clear were at least broad enough to provide for immunity in such investigations as the Congress might authorize. The fact that Congress has had little occasion to enact additional clauses in other areas since that time for the use of its own committees can hardly have a bearing. What is relevant is Congress' intent in 1903, in passing an act after 46 years' experience with what had been thought for 35 of those years to be an effective immunity statute.

3. Appellant suggests (Jurisdictional Statement, pp. 9-10) that the history of 15 U.S.C. 32 is "intimately involved" with that of the Compulsory Testimony Act of 1893 and that this somehow limits the scope of 15 U.S.C. 32. Actually the limitation is illusory. Even if it were true that the 1903 immunity provision was intended to be somehow related to that of 1893, the "plain" limitation to administrative and judicial proceedings which the Appellant finds in the earlier Act is certainly not apparent on its face. That Act, 27 Stat. 443, provided:

> "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, *or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress,* entitled, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." (Emphasis supplied)

The limitation which Appellant finds is not apparent and has never been found by any court. The fact that an earlier version of the bill was limited to criminal cases can hardly be persuasive.

In any event the interrelationship between two statutes is certainly less clear than is suggested. The first begins

by denying the availability of the Fifth Amendment privilege and ends with a grant of immunity. The other begins with immunity and leaves the denial of the privilege to inference.

Appellant pictures 15 U.S.C. 32 as the reaction of a shocked Congress to a startling decision in *Foot* v. *Buchanan*, 113 Fed. 156 (C.C.N.D. Miss. 1902). That case did say, as is suggested, that the 1893 Act did not apply to the Sherman Act. This could hardly have startled anyone, however, as a simple reading of the language above would make clear. The court in *Foot* merely stated the proposition in the course of demolishing the suggestion, rather desperately put forward by a district attorney who saw his case slipping from him, that this Court's decision in *Brown* v. *Walker*, 161 U.S. 591 (1896) had overruled *Counselman* v. *Hitchcock, supra*. Apart from the obvious *post hoc* fallacy of the Appellant's argument, there is no history whatever establishing a relationship between the immunity acts of 1893 and of 1903.

III. The Significance of the Question Presented Is Not Sufficiently Substantial to Require Plenary Consideration by This Court.

The Jurisdictional Statement suggests (pages 10-12) that the result of the decision below would be a drastic interference with the conduct of Congressional investigations and with the administration of the antitrust laws. The adverse consequences imagined are, however, entirely chimerical.

The decision below involved a hearing before one subcommittee of one Committee of the House conducting one single investigation for one specifically announced purpose. It had nothing to do with sixteen of the seventeen Congressional Committees listed by Appellant on page 11 of

the Jurisdictional Statement. Whether any of these Committees has or intends to conduct investigations under the antitrust laws raising the issue here is a question not now before this Court, and if they do there should be no more difficulty in recognizing such an investigation than there is in determining whether a particular Grand Jury investigation is within the ambit covered by 15 U.S.C. 32.

Immunity statutes are not generally thought to be a hindrance to investigation. Indeed they are passed for the precise purpose of aiding investigation. In the antitrust field, they make it possible, by compelling testimony from certain individuals involved to uncover evidence against those primarily responsible and corporate offenders. The suggestion that Congressional Committees are not equipped with the ability or discretion to conduct investigations without needlessly conferring immunity on the wrong people is properly addressed to Congress and not to this Court. Appellant's further complaint, that witnesses need not claim their privilege against self incrimination in order to receive immunity, results from the decision of this Court in *United States* v. *Monia*, 317 U.S. 424 (1943) and not from the decision in the court below. This too is subject to adjustment by Congress if the existing arrangements are not satisfactory, but in the past twenty years Congress has not seen fit to make any change. The present rule does not seem to have inhibited the Department of Justice in the conduct of Grand Jury investigations.

The principal complaint of the Appellant appears to be over what it regards as an unwarranted intrusion of Congress into an area the Department of Justice would rather have reserved for itself. This is hardly a matter with which this Court should concern itself. If Congress wishes its Committees to have the power which they now have, it can assign them that power, and if this Court should accede to the Justice Department's plea to take the

power away, Congress can at will return it. If, on the other hand, there is merit to the Department's claim that Congressional committees should not have such power, Congress can readily perform its own function by removing it. The only real significance of this case, therefore, is its importance to the Appellee, who, under compulsion, appeared before a Congressional committee and testified to matters going to the heart of the alleged offense for which he has been indicted. A simple sense of fair play requires that the immunity given him by the statute, which the only available precedent held was applicable, should not now be taken from him.

CONCLUSION

This appeal does not present any substantial question sufficient to require plenary consideration by this Court.

Respectfully submitted.

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July 23, 1963